No. 04-728

Supreme Court, U.S.
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In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT AS TO WHY THE WRIT SHOULD BE GRANTED

The opening argument of the respondent's Brief in Opposition illustrates the split inherent in the cases which address what due process is required before a bankrupt debtor may obtain a discharge of student loans.

The respondent Educational Credit Management Corporation (ECMC) argues that this Court stated "the precise process due to a student loan creditor" in *Tennessee Student Assistance Corp. v. Hood*, when the Court wrote that the current Bankruptcy Rules "require the debtor file an 'adversary proceeding'." 541 U.S. 440, ___, 124 S.Ct. 1905, 1912-13, 158 L.Ed.2d 764, 777 (2004).

However, this Court specifically noted in *Hood* that an adversary proceeding is not a requirement of constitutional due process. The Court wrote:

> The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern. . . . We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be of dispositive weight.

541 U.S. ___, 124 S.Ct. at 1914, 158 L.Ed.2d at 779.

The Fourth Circuit's decision below is not consistent with this Court's decision in *Hood* because the Fourth Circuit held that "due process entitles the creditor to receive notice . . . as provided by the Bankruptcy

Rules," *Educ. Credit Mgmt Corp. v. Doane (In re Doane)*, 2004 WL 1433436 at *1 (4th Cir. June 28, 2004), *aff'g Educ. Credit Mgmt Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003), even though this Court clearly stated in *Hood* that an adversary proceeding is not a constitutional requirement.

The issue posed by this case--whether an order which discharges a student loan is void on due process grounds when the debtor did not first file an adversary proceeding--continues to be unsettled.

A review of the recent cases cited by ECMC illustrates the disagreement among the lower courts on this issue.

The Fourth Circuit is the only Court of Appeals in the country which has ruled that an order discharging a student loan is void on due process grounds unless the debtor has first filed an adversary proceeding. *Banks v. Sallie Mae Servicing Corp.*, 299 F.3d 96 (4th Cir. 2002). The rule in the Ninth and Tenth Circuits, the two other Courts of Appeals that have addressed the issue, is the opposite. Contrary to ECMC's attempt to confuse the issue, the Tenth Circuit has not overruled *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999), nor has the Ninth Circuit overruled *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). The rule in the Fourth Circuit continues to be that an order which discharges a student loan is void unless the debtor filed an adversary proceeding, and the rule in the Ninth and Tenth Circuits continues to be that

such orders are not void.[1]

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[1] The respondent's assertion that Ms. Doane is "attempt[ing] to create a circuit split" by pointing to the discharge-by-declaration cases is disingenous. Throughout this litigation, Ms. Doane has argued that the erroneous form discharge order situation is different from the discharge-by-declaration situation and should be analyzed differently because the erroneous form discharge problem arose out of a systemic error throughout the country. Ms. Doane argued below that ECMC knew of the error for years, but took no action to appeal the erroneous discharge orders, seek reconsideration of the orders, or attempt to have the Administrative Office of the U.S. Courts or local clerks to correct the erroneous order. The Bankruptcy Court agreed with this argument, as did other Courts around the country who were faced with the naked issue of the erroneous form discharge order. *See, e.g., Peterson v. Student Loan Marketing Ass'n*, 1999 Bankr. LEXIS 1317, 16 Colo. Bankr. Ct. Rep. 307 (10th Cir. B.A.P. 1999); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001), *rev'd at Poland v. ECMC (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004); *ECMC v. Pearson*, 2000 Bankr. LEXIS 1972 (Bankr. M.D.Ga. 2000), *rev'd at ECMC v. Pearson*, 2002 U.S. Dist. LEXIS 815 (M.D.Ga. 2002). However, the district court here reversed, applying the Fourth Circuit's *Banks* decision, a discharge-by-declaration case, and the Fourth Circuit affirmed, stating that *Banks* controls Ms. Doane's case, even though it is not a discharge-by-declaration case. Ms. Doane addresses the split among the circuits on the discharge-by-declaration cases only because the Fourth Circuit has placed her case in the discharge-by-declaration category and there is a split among the circuits in that category.

The Ninth Circuit has not overruled *Pardee*, and there is a split within the lower courts in that circuit as to whether due process requires the filing of an adversary proceeding to discharge a student loan. In *Educ. Credit Mgmt Corp. v. Repp (In re Repp)*, 307 B.R. 144, 149 (Bankr. 9th Cir. 2004), the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court, which had followed *Pardee*, and held that due process did not require the debtor to file an adversary proceeding to obtain a discharge of a student loan. *Id.* at 147. The B.A.P. held that "[w]e agree with the Fourth Circuit to the extent that notice less than which results from compliance with Rule 7004's requirement for serving a complaint on a corporate defendant flunks due process." *Id.* at 146.

However, Bankruptcy Judge Ryan, one of the members of the three-judge panel dissented, stating that *Pardee* controlled, and that *Pardee* was decided correctly because:

> [T]he idea that a creditor with more than twenty-five days notice of a plan containing a provision that adversely affects it can ignore the proceeding, sit on its rights, and then raise a due process argument years later defies common sense.

Id. at 155.

Thus, the B.A.P. decision in *Repp* does not overrule, or even undermine, the Ninth Circuit's decision in *Pardee*. The bankruptcy court and one member of the B.A.P. panel followed *Pardee* and held that it was correctly decided. Even the panel majority noted that

Pardee "widened a split . . . by siding with the Tenth Circuit on the question of the effect of "illegal" chapter 13 plan provisions." *Id.* at 147 n.2. Most importantly, even though the B.A.P. decided *Repp* in a manner which is not consistent with *Pardee*, the Ninth Circuit itself has not overruled *Pardee*. Thus, even within the Ninth Circuit, *Pardee* continues to be good law and, at most, *Repp* merely demonstrates that a panel majority of the B.A.P. agrees with the Fourth Circuit's *Banks* decision and disagrees with the Ninth Circuit's *Pardee* ruling and the Tenth Circuit's *Anderson* decision.

The cases in the Tenth Circuit also indicate a clear and definite split with the Fourth Circuit. The Tenth Circuit's decision in *Poland v. Educ. Credit Mgmt Corp.*, 382 F.3d 1185 (10th Cir. 2004) did not overrule *Anderson*. In *Anderson*, the debtor had filed a plan which stated that "[c]onfirmation of debtor's plan shall constitute a finding" that the student loans imposed an "undue hardship on the debtor and the debtor's dependents." 179 F.3d at 1254. In *Poland*, the debtor filed a plan which stated that "she disputed the validity and amount of her student loan debt" and that if the student loan creditor failed to timely file a proof of claim "the claim shall be deemed discharged in its entirety upon completion of the plan." *Id.* at 1187.

In *Poland*, the Tenth Circuit wrote that "[t]he panel is of the view that *Anderson* was wrongly decided and should be reconsidered." 382 F.3d at 1189 n.2. However, the Court did not overrule *Anderson* and merely held that *Anderson* was not applicable because the plan in *Anderson* explicitly stated that the confirmation of the plan constituted a finding of hardship, while the plan in *Poland* did not contain any language which could

constitute a finding of hardship.

In *Poland*, the bankruptcy court and the district court held that the erroneous form discharge order which the debtor received was valid, regardless of the plan language. *Id.* at 1189. The Tenth Circuit reversed, holding that *Anderson* did not apply because the erroneous form discharge order did not constitute a finding of hardship. *Id.* at 1189.

The Tenth Circuit B.A.P. has applied *Poland* in four recent cases in a manner which illustrates that the Tenth Circuit rule, in contrast to the Fourth Circuit rule, is that a debtor is not required to bring an adversary proceeding to obtain the discharge of a student loan. In *Educ. Credit Mgmt Corp. v. Nelson (In re Nelson)*, 2004 WL 2896631 (Bankr. 10th Cir. 2004), *Educ. Credit Mgmt Corp. v. Boyer (In re Boyer)*, No. KS-04-015 (Bankr. 10th Cir. 2004)(unpublished), and *Educ. Credit Mgmt Corp. v. Seiwert (In re Seiwert)*, No. KS-04-016 (Bankr. 10th Cir. 2004), the Tenth Circuit B.A.P. reversed bankruptcy courts which applied *Anderson* and declared student loans discharged on the grounds that *Poland* required that there be some language in the Chapter 13 plan which could constitute a finding of "hardship." However, on the same day, the same panel of the B.A.P. affirmed the district court finding in *Educ. Credit Mgmt Corp. v. Mersmann*, 2004 WL 2896633 (Bankr. 10th Cir. 2004) that the student loan was discharged on the grounds that the language in the Chapter 13 plan stated that the confirmation of the plan stated that the confirmation constituted a finding of hardship, even though the debtor did not file an adversary proceeding. Thus, the 10th Circuit B.A.P. has applied *Poland* to mean that, contrary to the Fourth Circuit rule in *Banks*, a debtor can obtain a

discharge of her student loan without first filing an adversary proceeding, so long as the plan is drafted properly, and that due process does not require the filing of an adversary proceeding.

Thus, contrary to ECMC's strident assertion, the recent cases do not resolve the Circuit split. The split is as wide as ever. The Tenth Circuit was given an opportunity to overrule *Anderson* in *Poland*, but it did not do so, and the subsequent Tenth Circuit B.A.P. cases demonstrate that debtors in the Tenth Circuit are not required to first file an adversary proceeding to obtain a discharge of their student loans, so long as their plan is drafted properly. The Ninth Circuit B.A.P. has stated its disagreement with the Ninth Circuit's *Pardee* decision, but a minority of the B.A.P. and the lower courts in the Ninth Circuit have explained why they think *Pardee* was decided correctly, and the Ninth Circuit itself has not overruled *Pardee*.

Thus, Ms. Doane's case presents a square split among the Circuits. Since Ms. Doane lives in the Fourth Circuit, *Banks* controlled, and her erroneous form discharge order was declared to be void only because she did not first file an adversary proceeding to determine if the student loan debt was discharged. If Ms. Doane lived in the Ninth Circuit, her case would be controlled by *Pardee* and the discharge would have been enforced because ECMC failed to appeal or seek reconsideration of the confirmation order and the discharge order. If Ms. Doane lived in the Tenth Circuit, her erroneous form discharge order would not have been enforced because her plan did not state that plan confirmation constituted a finding of hardship, not because she did not file an adversary proceeding. Nevertheless, the rule in the

Tenth Circuit remains that, contrary to the Fourth Circuit rule in *Banks*, a debtor is not required to file an adversary proceeding to obtain discharge of a student loan but, under *Anderson* and *Poland*, may obtain a discharge if the debtor includes "hardship" language in the Chapter 13 plan.

The Constitution contemplates that bankruptcy law should be uniform. U.S. Const. art. II § 8 (Congress is authorized to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). The law on discharges-by-declaration and erroneous form discharge orders is not now uniform. At least tens of thousands of debtors, perhaps hundreds of thousands of debtors, around the country have received Chapter 13 discharge orders which, by their plain language, have discharged the debtors' student loans. Debtors who live in the Ninth and Tenth Circuits may obtain a discharge of their student loan debt without first filing an adversary proceeding, while debtors in the Fourth Circuit may not. This Court should address the disparity around the country.

This case squarely presents the issue of what process is due before a student loan may be discharged. Although there is a split of authority on the due process issue, debtors who have received valid court orders discharging their student loans are at least entitled to a final, nationwide, determination as whether, or why, a student loan creditor like ECMC was denied due process when it received notice of the Chapter 13 plan, failed to object to it prior to confirmation, received notice of the confirmation hearing and failed to appear, received the confirmation order but failed to appeal it or seek reconsideration of it, received the discharge order but

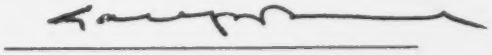
failed to appeal it or seek reconsideration of it, all at a time when it was litigating erroneous form discharge order issue all over the country in other cases. As Bankruptcy Judge Ryan wrote is his dissent to the Ninth Circuit B.A.P. decision in *Repp*, the premise that all of this notice does not meet the constitutional standard of due process, but that due process also requires the filing of an adversary proceeding, "defies common sense." This Court should grant certiorari to provide guidance as to how much due process is enough in this context.

CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

KIMBERLY DOANE

By: 

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